[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Re West End Construction Ltd. et al. and Ministry of Labour for Ontario et al.

ANDERSON, SAUNDERS AND McKINLAY JJ. 25TH NOVEMBER 1986.

Human rights legislation — Human Rights Commission — Complaint procedure — Limitations — Act barring action for sum of money given by statute to any party aggrieved unless brought within two years after cause of action arose — Complaint of discrimination under human rights legislation subject to limitation period — Ontario Human Rights Code, R.S.O. 1980, c. 340 — Limitations Act, R.S.O. 1980, c. 240, s. 45(1)(h).

A board of inquiry under the *Ontario Human Rights Code*, R.S.O. 1980, c. 340, upheld two complaints that the appellant had unlawfully discriminated in respect of the rental and occupancy of commercial units. Substantial compensation was awarded. The complaint of T was brought in 1979, but it was based on events in 1976. The complaint of L, brought in March, 1979, referred to events in January and February of 1979. On appeal, held, the appeal should be allowed in part, and the order of the board of inquiry varied to set aside all sums awarded to T.

T's complaint was barred by s. 45(1)(*h*) of the *Limitations Act*, R.S.O. 1980, c. 240, which provides that an action for a penalty, damages or a sum of money given by any statute to the Crown or any party aggrieved must be brought within two years after the cause of action arose. "Action" is defined in s. 1(*a*) to include any civil proceedings. A complaint of discrimination under the *Ontario Human Rights Code* is a civil proceeding and thus is an action within s. 1(*a*) of the *Limitations Act*. The award of damages is a sum of money given by statute within s. 45(1)(*h*). Therefore, s. 45(1)(*h*) applies to complaints under the Code. The limitation period begins to run at the time when the conduct which is the subject-matter of the complaint took place and ceases to run when the complaint is made.

Robinson v. Essex (1932), 41 O.W.N. 342, folld

Yarrows v. Frowde Ltd., [1934] O.R. 526, [1934] 3 D.L.R. 711, 62 C.C.C. 101, distd

Other cases referred to

Attorney General v. British Broadcasting Corp., [1980] 3 All E.R. 161; *Roberts v. Metropolitan Borough of Battersea* (1914), 110 L.T. 566; *China v. Harrow Urban District Council*, [1954] 1 Q.B. 178; *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718; *Johnson Controls, Inc. v. Varta Batteries Ltd.* (1984), 80 C.P.R. (2d) 1, 3 C.I.P.R. 1, 53 N.R. 6; leave to appeal to S.C.C. refused 56 N.R. 398*n*; *Board of Governors of Seneca College of Applied Arts & Technology v. Bhadauria* (1981), 124 D.L.R. (3d) 193, [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 22 C.P.C. 130, 37 N.R. 455; *A.M. Smith & Co. Ltd. v. The Queen* (1981), 120 D.L.R. (3d) 345, [1982] 1 F.C. 153, 20 C.P.C. 126, 36 N.R. 206 *sub nom. A.M. Smith & Co. Ltd. v. Government of Canada*; *Re City of Moncton and Buggie et al.* (1984), 14 D.L.R. (4th) 100, 57 N.B.R. (2d) 211; revd 21 D.L.R. (4th) 266; leave to appeal to S.C.C. refused 66 N.B.R. (2d) 270, 65 N.R. 75*n*; *Re McGavin Toastmaster Ltd. et al. and Powlowski et al.* (1973), 37 D.L.R. (3d) 100, [1973] 5 W.W.R. 388 *sub nom. Bakery & Confectionery Workers' Int'l Union of America, Local 389 — Winnipeg v. Manitoba Human Rights Com'n et al.*

Constitutional law — Charter of Rights — Fundamental justice — Challenge to jurisdiction of board of inquiry under human rights legislation — No bias in board — Award of damages does not affect security of person — Canadian Charter of Rights and Freedoms, s. 7 — Ontario Human Rights Code, R.S.O. 1980, c. 340.

Cases referred to

Re Commodore Business Machines Ltd. et al. and Minister of Labour for Ontario et al. (1984), 49 O.R. (2d) 17, 14 D.L.R. (4th) 118, 13 C.R.R. 338

Human rights legislation — Human Rights Commission — Board of inquiry — Board of inquiry awarding interest on damages after upholding complaint of discrimination — Board acting within jurisdiction — Ontario Human Rights Code, R.S.O. 1980, c. 340, s. 19(b).

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 11
Limitations Act, R.S.O. 1927, c. 106, s. 48(*h*)
Limitations Act, R.S.O. 1980, c. 240, s. 45(1)(*h*)
Ontario Human Rights Code, R.S.O. 1980, c. 340, ss. 3, 19 (repealed by s. 48 of, and replaced by the *Human Rights Code*, 1981 (Ont.), c. 53)

APPEAL from a decision of a board of inquiry under the *Ontario Human Rights Code*.

Harold Elliott, Q.C., and *John G. Richardson*, for appellants.

Janet E. Minor, for respondent, Ontario Human Rights Commission.

ANDERSON J.:—This is an appeal from the order of Peter A. Cumming, Q.C., a board of inquiry under the *Ontario Human Rights Code*, R.S.O. 1980, c. 340 (the Code). The order of the board directed the appellants to cease and desist in certain alleged acts of unlawful discrimination in respect of the rental and occupancy of commercial units, and awarded substantial compensation to the respondents, Bahjat Tabar, Chong Man Lee and Kyung S. Lee. The appellants raised a number of grounds of appeal, most of which can be disposed of shortly. Judgment was reserved only for the purpose of dealing with one point: whether the complaint of the respondents Tabar and Lee, or any of them, was barred by s. 45(1)(*h*) of the *Limitations Act*, R.S.O. 1980, c. 240 (the Act). The style of cause was amended on consent to delete the Ministry of Labour for Ontario.

The facts necessary for our consideration and disposition of the appeal are not in dispute and may be stated shortly. West End Construction (West End) is the owner of an apartment complex. The appellant Scott is an officer and employee of West End responsible for management of the premises. There is a store in the basement floor of the complex in which is located a commercial

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enterprise known as the tuck shop. It is that portion of the premises with which we are concerned in this appeal. Tabar was a lessee of the tuck shop, pursuant to a lease dated September 1, 1975. After operating it for five weeks, Tabar received an offer to purchase the business from Jivraj. West End declined to consent to the assignment of lease. Tabar received another offer to lease from Chu. Consent to the assignment was refused. In October of 1976 an offer was received by Tabar from Andani. Again, consent to assignment of the lease was refused. Ultimately a sale was made by Tabar to Khang and a consent to assignment was given. Khang sold the business to the Lees and West End consented to the assignment of the lease. In February of 1979 Lee received an offer to purchase from Samji. West End refused to consent to assignment of the lease.

In March of 1979 Lee filed a complaint pursuant to the provisions of the Code. Some time after March, 1979, the Ontario Human Rights Commission (the Commission) contacted Tabar and urged him to make a complaint. On May 18, 1979, Tabar filed a complaint. Subsequently, fresh complaints were filed by both Tabar and Lee. It is not necessary to deal with the details at the moment. Tabar and Lee alleged discrimination pertaining to the refusal to consent to the assignments of lease. The board found that Scott was prejudiced against persons of East Indian origin, that he caused West End to refuse its consent for that reason, and that thereby both Scott and West End discriminated against East Indians as a class of persons.

The sections of the Code relevant for present purposes are s. 3 and s. 19, in the following terms:

> 3(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,
>
> (*a*) deny to any person or class of persons occupancy of any commercial unit or any housing accommodation; or
>
> (*b*) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit or any housing accommodation,
>
> because of race, creed, colour, sex, nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons.
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> . . . . . .
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> 19. The board, after hearing a complaint,
>
> (*a*) shall decide whether or not any party has contravened this Act; and
>
> (*b*) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.

While the matter was pending before the board, the appellants moved to prohibit the board from continuing, alleging a reasonable apprehension of bias. This application was dismissed by the Divisional Court on February 15, 1984. The hearing then continued, resulting in the order which is appealed from. The board found a breach of s. 3(1)(*a*) and (*b*) and awarded substantial damages by way of compensation.

I propose first to deal briefly with the grounds of appeal other than limitation. As taken in order from the appellants' factum, they are the following:

1. Bias.
2. Constitutionality of award of "damages for the loss arising in respect of the sale" of the business of Tabar and the Lees.
3. Award of "damages for the loss arising in respect of the sale" of the businesses of Tabar and the Lees.
4. The *Canadian Charter of Rights and Freedoms*, ss. 7, 11(*a*), (*b*) and (*d*).
5. Limitations.
6. Award of interest.

1. *Bias*

Any question concerning reasonable apprehension of bias was raised before the Divisional Court in the earlier proceedings and I do not propose to deal further with it. As to actual bias in fact having a bearing on the award, I am not prepared to find it on the record.

2. *Constitutionality of award of "damages for the loss arising in respect of the sale" of the business of Tabar and the Lees*

It was contended on behalf of the appellants that the jurisdiction of the board did not extend to an award of damages for pecuniary loss of the kind which makes up the major portion of the award in appeal. In my view, this question was decided adversely to the appellants in *Re Commodore Business Machines Ltd. et al. and Minister of Labour for Ontario et al.* (1984), 49 O.R. (2d) 17, 14 D.L.R. (4th) 118, 13 C.R.R. 338, a decision binding upon us. I do not propose to say anything more about it.

3. *Award of "damages for the loss arising in respect of the sale" of the business of Tabar and the Lees*

In the alternative to the argument concerning the constitutionality of the award, the appellants submitted that the award was excessive, having regard for the evidence which was before the

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board. While that evidence was not entirely satisfactory, I am not prepared to say that there was no evidence to sustain the award or that in its assessment there was any such error in principle as to invite intervention upon appeal.

4. *The Canadian Charter of Rights and Freedoms, ss. 7, 11(a), (b) and (d)*

Section 7 reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The only argument made concerning fundamental justice was with respect to bias. That argument I have rejected. I conclude as the court did in *Commodore* that s. 7 is therefore not material. In any event, if necessary, I would hold that the award did not affect "security of the person" within the meaning of s. 7.

In my view any argument under s. 11 of the Charter has been decided by *Commodore* in a manner adverse to the appellants and we are bound by that decision.

5. *Award of interest*

It was contended on behalf of the appellants that there was no jurisdiction in the board to make the award of interest which was included in its order. In my view, the word "compensation" as contained in s. 19(*b*) of the Code is sufficiently broad to include interest. I note that the board of inquiry in *Commodore* awarded interest. The proceedings in the appeal to Divisional Court indicate that this issue was raised in the appeal, was apparently not argued and finds no reflection in the reasons for judgment.

6. *Limitations*

The fifth ground of appeal raises the question whether recovery of compensation was barred by s. 45(1)(*h*) of the Act. As indicated previously, this in my view is the only point in the appeal which requires extended consideration.

For convenience of reference I set out again s. 19 of the Code:

> 19. The board, after hearing a complaint,
>
> (*a*) shall decide whether or not any party has contravened this Act; and
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> (*b*) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.

The relevant provisions of the Act are the following:

1. In this Act

(*a*) "action" includes an information on behalf of the Crown and any *civil proceeding*.

. . . . .

45(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,

. . . . .

(*h*) an action for a penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved, within two years after the cause of action arose.

(Emphasis added.)

It is the contention of the appellants that the complaint of Tabar at any rate, and Lee possibly, is barred by the Act. This issue involves a consideration of two subsidiary questions:

(1) Is the matter dealt with by the board an "action" within the meaning of that word as used in the Act? and

(2) if the answer to (1) is yes, is it an action within the meaning of that word as used in s. 45(1)(*h*) of the Act?

There is no decision directly in point, that is, dealing with a claim under the Code. I propose therefore to deal with the matter initially as one of first impression, and then to review the matter in the light of cases which apply s. 45(1)(*h*), or similar legislation, to other claims. Dealing with the matter thus, I would have little hesitation in answering both of the above questions in the affirmative.

"Proceeding" in its ordinary meaning is a word of very wide application: see, for example, Shorter Oxford Dictionary (1973):

> A particular action or course of action; a piece of conduct or behaviour; a transaction . . .

I think it obvious that the sequence of events which occurred following the laying of the complaints and culminating in the award may properly be called a proceeding. Indeed, I do not understand that anyone seriously suggests otherwise. The board clearly considered that was the case, but concluded the Act did not apply because it was not a "civil proceeding" but an "administrative proceeding". In my view that distinction is not helpful for present purposes. I see no reason why a "proceeding" may not be both "administrative" and "civil". The board says in its reasons: "It is only before a court of law that there can be a 'civil proceeding'." No authority for this statement is given, and I have found none.

Untutored by authority or learned opinion I would conclude without doubt that the sequence of events under review constitutes an "action" within the definition in s. 1(*a*) of the Act.

Turning to the second of the questions I have posed, is it an "action" within the meaning of s. 45(1)(*h*); specifically, is it ". . . an action for . . . damages . . ." or "a sum of money given by . . . statute to . . . the party aggrieved". The complainants certainly took the position, by and in their complaints, that they were aggrieved. Each received a sum of money by the award of the board. The only question of any difficulty is whether it can be said that the "sum of money" was "given by . . . statute". In my view it was, notwithstanding that it required the intervention of the board to make the giving effective. Without the statute, the complainants would have had nothing as a result of the subject-matter of grievance; with it, if the award stands, they will receive substantial sums of money.

Again, unguided by authority, I would have no doubt that the sequence of events under review was an "action" within the meaning of s. 45(1)(*h*).

I will now review my preliminary conclusions in the light of such authority as is available: first, that the sequence of events is an action.

I say by way of digression that there is no case in Ontario which is of much help. The dearth of authority dealing with s. 45(1)(*h*) of the Act was the subject of comment in the "Report on Limitation of Actions" (Ontario Law Reform Commission, 1969). Any guidance from authority can be only indirect and by way of extension or analogy.

Jowitt's Dictionary of English Law, 2nd ed. (1977), p. 39, defines "action" as follows:

> . . . the form prescribed by law for the recovery of one's due, or the lawful demand of one's right.

Halsbury's Laws of England, 4th ed., vol. 37, p. 24, para. 17, includes the following:

> 17. . . . In its natural meaning "action" refers to any proceeding in the nature of a litigation between a plaintiff and a defendant . . .

I consider the proceeding before the board to be a "litigation" as thus defined.

I recognize the position of the Commission that the proceeding is administrative. I have neither desire nor need to venture into that twilight zone which divides the administrative from the judicial. I greatly admire the classic understatement of Lord Edmund-Davies in *Attorney General v. British Broadcasting Corp.*, [1980] 3 All E.R. 161, where he says [at p. 175]:

> At the end of the day it has unfortunately to be said that there emerges no sure guide, no unmistakable hallmark by which a "court" . . . may unerringly be identified.

No lawyer who read the elaborate reasons for decision of the board could fail to conclude that the respondents were seeking recovery of compensation from the appellants on the basis of conduct of the appellants by which the respondents deemed themselves aggrieved; in other words, whatever the nature of the process or the objectives of the Code a *lis* between the respondents and the appellants was involved. This is none the less so because the Commission has carriage of the complaints.

In *Roberts v. Metropolitan Borough of Battersea* (1914), 110 L.T. 566 at p. 568, Buckley L.J. said:

> "Proceeding" would be a word with a larger meaning than "action". Every action is a proceeding, but it is not possible to say that every proceeding is an action.

In considering the extended definition of "action" in s. 1(*a*) of the Act I have indicated that there seems to be no disagreement that what was before the board was a proceeding; the issue appears to be whether it was a "civil proceeding", and I have indicated that I do not think, in this connection, the distinction between a "civil proceeding" and an "administrative proceeding" is valid or useful. It seems to me that a comparison between "civil" and "penal" would be more apposite. *Mozley and Whitney's Law Dictionary*, 5th ed., p. 7, has this to say:

> A civil action is brought to enforce a civil right merely . . . a penal action aims at some penalty or punishment in the party sued, be it corporal or pecuniary; specially an action brought for recovery of the penalties given by statute.

I have already indicated that no authority was cited by the board for the following conclusion. "It is only a court of law before which there can be a civil proceeding." Some intimation of that might be taken from English writers and decisions dealing with the English Act. The extended definition in that Act (taking, for example, the 1939 Act [c. 21, s. 31(1)]) is in these terms:

> "Action" includes any proceeding *in a court of law* . . .

[Emphasis added.] Thus one finds, in Franks, *Limitation of Actions* (1959), a statement to this effect (referring to the 1939 Act):

> It is clear . . . that in this context "action" includes proceedings which it is not apt to describe in the normal way, but it seems that the proceedings must be judicial and not merely ministerial.

The footnote to the concluding clause refers to *China v. Harrow Urban District Council*, [1954] 1 Q.B. 178. In that case the question was whether the *Limitation Act*, 1939 (U.K.) applied to proceedings for the recovery of rates, which were recoverable, not by action but by application to the justices for a distress warrant.

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Consideration was given to whether, in issuing the warrant, justices were acting judicially and not ministerially. In my view, that distinction was significant because of the words of the English Act ". . . proceeding in a court of law". The words of our Act are clearly open to a wider interpretation.

I find nothing in the authorities which I have reviewed to cause me to resile from my initial conclusion that the events under review constitute a civil proceeding, and therefore an action within s. 1(*a*) of the Act.

Next, I will deal with the second and larger question of whether there is an action within the meaning of s. 45(1); in other words, is the action one to which the Act applies. A leading case referred to by the respondent Commission, which is also cited in Canadian cases and text-books on the subject, is *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718 (C.A.). The action was one by a dissident shareholder against directors of a company for compensation or damages by reason of untrue statements in the prospectus under s. 3 of the *Civil Procedure Act*, 1833 (U.K.), c. 42, which provided that all actions for penalties, damages or sums of money given to the party grieved by any statute must be brought within two years. In holding that the limitation did not apply the Court of Appeal held that it applied only to penal actions. At pp. 725-6, Lindley M.R. says:

> There was another class of actions as to which there was no definite limitation of time, namely, "actions for penalties, damages or sums of money given to the party grieved" by various Acts of Parliament, by way of penalty or punishment; not by way of compensation to the person injured, but where, as was pointed out by Lord Esher M.R. when commenting in *Saunders v. Wiel*, [[1892] 2 Q.B. 321] upon *Adams v. Batley* [18 Q.B.D. 625], punishment was the object; and where the money to be paid, whether it was called penalty, or damage or sum of money, was not assessed with the view of compensating the plaintiff, although he might put some of it in his pocket. That is the class of action which was contemplated by the latter part of s. 3. In other words, they were what are popularly called "penal actions." We arrive at this from the history of the Act, and from a knowledge of the then state of the law and the defect which was to be cured.
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> Now, taking that as our guide, it is, I think, obvious that an action under the Directors Liability Act, 1890, does not come within that class of action. It may be hypercritical, but even the words if critically looked at do not cover such an action as this. The Directors Liability Act does not in terms give an action or damages or a penalty. Nothing is given by the Act. What you find in the Directors Liability Act is a liability imposed—a liability to make compensation—and the money payable is obviously a compensation to the plaintiff for the loss which he has sustained. It must be estimated and awarded with reference to that. It does not in the least resemble a "penalty, damages or sum of money" imposed by statute as a punishment without reference to the injury sustained by the person who sues for it. Therefore,

whether you look at the language of the two acts, or whether you look at the good sense of the thing and the history of the legislation, it seems to me plain (although I admit that at first sight there is a little difficulty in the language) that this is not an action "for a penalty, damages or sum of money" within s. 3 of the Act of 1833.

While this judgment, because of its source and its age, is of much persuasive value, it has never been followed in Ontario and is not binding on this court. It has been approved in the Federal Court of Appeal: see *Johnson Controls, Inc. v. Varta Batteries Ltd.* (1984), 80 C.P.R. (2d) 1, 3 C.I.P.R. 1, 53 N.R. 6.

These authorities suggest that s. 45(1)(*h*) is confined to actions for recovery of a penalty, that is, a sum of money payable by way of punishment. This is not such a case.

The case in Ontario most directly in point is *Robinson v. Essex* (1932), 41 O.W.N. 342 (C.A.). It points to a different conclusion. Unfortunately, the full text of the judgment is not available. The note of the case, to the extent relevant, reads as follows [at pp. 342-3]:

> The plaintiff owned certain lands in the township of Maidstone north of the boundary between the township of Maidstone and the defendant municipality. He alleged that in the years 1923, 1926 and 1925 he suffered damages through loss of his crops from water discharged upon his lands owing to the negligence of the defendant in allowing a drain or ditch to become out of repair.
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> The defendant contended,
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> (1) That the drain was not out of repair and that any damage suffered by the plaintiff was due to extraordinary rainfall which could not have been anticipated.
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> (2) That the drain was constructed under the provisions of the Municipal Drainage Act, R.S.O. 1927, ch. 241.
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> (3) That the plaintiff had not given to the defendant any notice "describing with reasonable certainty the alleged lack of repair of such drainage work" as required by the Municipal Drainage Act, R.S.O. 1927, ch. 241, sec. 79(2).
>
> (4) That the plaintiff's claim for damages in respect to the years 1923 and 1926 was barred by the Limitations Act, R.S.O. 1927, ch. 106, sec. 48(h), which provides that any action for damages given by any statute must be brought within two years after the cause of action arose.
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> . . . . . .
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> However, the claim for damages in 1926, as that in 1923, was rightly held by the trial Judge to be barred by R.S.O. 1927, ch. 106, sec. 48, subsec. (h), which provides that any action for damages given by any statute must be brought within two years after the cause of action arose.
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> It was argued that the plaintiff's claim was made at common law and not under the statute. The purpose, however, of the Municipal Drainage Act, under which the drain was constructed, is that all claims for damages arising from works constructed under that Act should be maintainable only under its provisions.

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(Section 48(*h*) of the *Limitations Act*, R.S.O. 1927, c. 106, was in terms identical to s. 45(1)(*h*) of the Act.)

In summary, authority which is persuasive and entitled to deference, but not binding, suggests that s. 45(1) does not apply. Authority more directly in point, and binding on this court, suggests that it does.

I have earlier discussed whether the action is for ". . . a sum of money given by . . . statute" and have indicated my view that it is. Confirmation of this view is to be found in *Robinson v. Essex*, *supra*. It is clear that although recovery was available under the *Municipal Drainage Act* only by the bringing of an action, the damages awarded were held to have been given by statute. Considering *Robinson* I observe also the following note on p. 343:

> The purpose . . . is that all claims for damages arising from works constructed under the Act should be maintainable under its provisions.

Likewise it is clear that any award of compensation for subject-matter of complaint under the Code can only be recovered by the machinery of the Code: see *Board of Governors of Seneca College of Applied Arts & Technology v. Bhadauria* (1981), 124 D.L.R. (3d) 193, [1981] 2 S.C.R. 181, 14 B.L.R. 157, especially the judgment of Laskin C.J.C. at p. 198.

A.M. Smith & Co. Ltd. v. The Queen (1981), 120 D.L.R. (3d) 345, [1982] 1 F.C. 153, 36 N.R. 206, *sub nom. A.M. Smith & Co. Ltd. v. Government of Canada* (C.A.), referred to by counsel for the Commission, deals only incidentally and *obiter* with the question which is before us. *Yarrows v. Frowde Ltd.*, [1934] O.R. 526, [1934] 3 D.L.R. 711, 62 C.C.C. 101 (C.A.), deals with recovery of a penalty and is not applicable to this case.

I find nothing to cause me to resile from my initial conclusion that s. 45(1)(*h*) applies.

I am reinforced in my opinion by other considerations. In *China v. Harrow*, *supra*, at p. 185, Lord Goddard C.J. said:

> Limitation of actions is imposed by positive law and courts can only refuse to enforce claims on the ground of lapse of time if there is an appropriate provision to be found in the Act, but I see no good reason for unduly limiting words which can apply to a particular case as courts always lean against stale claims.

Stale claims under the Code present a particular hazard. The conduct which may bring into operation the machinery of the Code is difficult of precise definition and, perhaps of necessity, somewhat amorphous. The prosecution of a complaint under the Code is onerous, and potentially oppressive of a person whose conduct is called in question. Such a person is required to make

defence, with all the attendant apprehension and expense, of a proceeding which may be, and frequently is, protracted in its nature, and painful in its circumstances. The board of inquiry is not constrained by the rules of evidence. The safeguards which attend ordinary litigation, such as production and discovery, are not present. A person can be subjected to substantial liability (as in this case) upon evidence and procedure which would never be countenanced in a court of law. I fully recognize that the Legislature has deemed this potentially oppressive legislation necessary to combat the evil at which it is aimed, and that is entirely within the competence of the Legislature. But, in my view, it is only reasonable that persons should be protected from exposure to such proceedings arising out of events long past. It is notorious that even where there are real safeguards in place, evidentiary problems are greatly increased with the passage of time from the event upon which the evidence bears.

In this context I think it significant to observe that since the events which gave rise to the case before us the Code has been amended to include the following provision:

> 33(1) Where it appears to the Commission that,
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> . . . . .
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> (*d*) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,
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> the Commission may, in its discretion, decide to not deal with the complaint.

Human Rights Code, 1981 (Ont.), c. 53. This newly created protection, fragile though it is, being dependent upon an unfettered discretion, is evidence of legislative recognition that injustice lurks in stale claims; and the period chosen is six months.

In the application of legislation such as this it must never be forgotten that the person accused of discriminatory practice also has rights, rights which are as fully entitled to protection as the rights of those who complain. Cautions along these lines are to be found in *Re City of Moncton and Buggie et al.* (1984), 14 D.L.R. (4th) 100 at p. 103, 57 N.B.R. (2d) 211, and in *Re McGavin Toastmaster Ltd. et al. and Powlowski et al.* (1973), 37 D.L.R. (3d) 100 at p. 119, [1973] 5 W.W.R. 388 *sub nom. Bakery & Confectionery Workers' Int'l Union of America, Local 889 — Winnipeg v. Manitoba Human Rights Com'n et al.*

It remains to consider three additional matters:

(1) When does the period defined in the Act start to run?

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(2) What stops the running of the period?

(3) Which, if either, of the claims under review are barred?

It seems to me that the period commences to run at the time when the conduct which is the subject-matter of complaint took place, and ceases to run when the complaint is made. In the latter conclusion I have the support of John I. Laskin, Esq., in his paper, "Proceedings Under the Ontario Human Rights Code", 2 Adv. Q. 290 (1979-81), at p. 299, note 56.

The respondent Tabar's first complaint was filed in May of 1979, and related to events alleged to have occurred in September and October of 1976. In my view it was out of time and is barred by the Act.

The respondent Lee's first complaint was filed in March of 1979 and related to events alleged to have occurred in January and February of 1979. It is not affected by the Act.

In the result I would allow the appeal in part, vary the order of the board by setting aside all sums awarded to the respondent Tabar and otherwise dismiss the appeal. Success being divided, I would make no order as to costs.

SAUNDERS J.:—I would agree with the disposition of this appeal as set out in the reasons of my colleague Mr. Justice Anderson.

If this court were not bound by the decision of the Court of Appeal in *Robinson v. Essex* (1932), 41 O.W.N. 342, I would not have barred the claim of Mr. Tabar, as I would have followed the decision of *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718.

The *Thomson* case decided that the provision corresponding to s. 45(1)(*h*) of the *Limitations Act*, R.S.O. 1980, c. 240, applied only to penal actions, that is, actions for penalties or damages or sums of money in the nature of penalties. The case has been followed by the Federal Court of Appeal (*Johnson Controls, Inc. v. Varta Batteries Ltd.* (1984), 80 C.P.R. (2d) 1, 3 C.I.P.R. 1, 53 N.R. 6) but does not appear to have been directly followed in Ontario. The report of the Ontario Law Reform Commission in 1969 on limitation of actions states that the subsection is based on the *Common Informers Act, 1588* and the *Civil Procedure Act, 1833*. The report also states that the words of the subsection in England have been construed very narrowly so as to include actions for recovering sums in the nature of penalties and that there appears to be no law on the point in Ontario. On the basis of the interpretation in *Thomson*, it is agreed that s. 45(1)(*h*) would not apply to a complaint that results in compensation under the *Ontario Human Rights Code*, R.S.O. 1980, c. 340.

I agree that a stale claim under the Code presents particular hazards and dangers. The facts of this appeal do not press one to seek a remedy for Mr. Tabar. On the other hand, courts can only refuse a remedy if there is an appropriate provision to be found in a limitation statute. With the exception of *Robinson*, s. 45(1)(*h*) and its predecessors have only been applied to penal actions. The point was not dealt with in *Robinson* and we do not know if it was argued. I would be hesitant to apply a limitation provision to a complaint under the Code where that provision was not recognized as applicable and where the limited case-law and comment indicate that it is inapplicable.

MCKINLAY J. concurs with ANDERSON J.

Appeal allowed in part.

[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Re The Queen in right of Ontario and Ontario Public Service Employees Union

SOUTHEY, WHITE AND BOWLBY JJ. 10TH JULY 1986.*

Employment — Labour relations — Grievance arbitration — Judicial review — Crown employee resigning as campaign manager after being informed that conduct violated ministry policy — Employee claiming policy unreasonable — Arbitration board empowered to hear grievances over discipline — No jurisdiction to hear grievance over statutory policy on political activity — Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, s. 18(2)(c) — Public Service Act, R.S.O. 1980, c. 418, ss. 11 to 16.

A Crown employee resigned as a campaign manager for a candidate in an election campaign because he was informed that such activity was a violation of ministry policy. Subsequently he grieved, claiming that the interpretation of the policy was unreasonable or that the policy itself was unreasonable and contrary to law. The Grievance Settlement Board ruled that it had jurisdiction to deal with the grievance as a matter of discipline. Section 18(2)(c) of the *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108, gives the board jurisdiction to hear grievances over discipline and discharge without just cause. On an application for judicial review, **held**, the application should be granted and the board's award should be quashed.

Sections 11 to 16 of the *Public Service Act*, R.S.O. 1980, c. 418, set up provisions relating to political activity by Crown employees and provides, in s. 16, that contravention is sufficient cause for dismissal. The ministry accurately conveyed the substance of the relevant statutory provisions to the grievor. As the exchange between the grievor and his supervisors was not disciplinary in substance, the Grievance Settlement Board had no jurisdiction to deal with the grievance about the policy.

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*Released September 18, 1986.